

Neutral Citation No:[2023] EWHC 1546 (KB

IN THE COUNTY COURT AT BIRMINGHAM

Case No: KA-2022-BHM-000048/H00LN652

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Thursday, 4th May 2023

Before:

THE HONOURABLE JUSTICE MARTIN SPENCER

B E T W E E N:

CANTWELL, DAVENPORT,
COULHURST & COULHURST

**CLAIMANTS
AND RESPONDENTS**

and

MR D MINNEY

**DEFENDANT
AND APPELLANT**

MR T CLARKE appeared on behalf of the Claimants
THE DEFENDANT appeared In Person

JUDGMENT
(Approved)

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MR JUSTICE MARTIN SPENCER:

1. This is a renewed application for permission to appeal by Mr Darren Minney, the defendant in proceedings for possession of land known as Goldsons Lane, Benington in Boston, with a postcode PE22 0BY; the proceedings brought by the administrators of the estate of the late Barbara Cantwell and executors of the estate of the late Mary Elizabeth Colthurst.
2. The proceedings were issued in September 2021 and at the trial it was the contention of Mr Minney, the appellant and defendant in the proceedings, that he had been in adverse possession of the land since 2009.
3. At the start this land was unregistered and had Mr Minney remained in adverse possession for a period of 12 years and the land had remained unregistered he would then have acquired a right to be registered as the proprietor of the land under the provisions of the Land Registration Act 2002.
4. However, the claimants applied to be registered and were registered in 2017. There is an issue as to whether the application to register was a regular application in that the name of one of the deceased was included as the registered proprietor. However, that is not a detail which need concern me in the decision I have to make today.
5. It is agreed between the parties that the effect of registration of the land in 2017 was to engage different provisions of the Land Registration Act and in particular the provisions of section 98 and schedule 6 to that Act.
6. In particular, it is conceded on behalf of the claimant respondent by Mr Clarke that the mere registration did not have the effect of stopping any adverse possession that was ongoing; what would stop adverse possession would of course be the bringing of proceedings for possession of the land.
7. The matter came before Mr Recorder Lyons and by his judgment on 3 August 2022 the learned Recorder rejected the case for the defendant that he had been in adverse possession since 2009. He made a finding of fact based principally upon his interpretation of certain photographs from Google Earth, but also the documentary and oral evidence of the witnesses, that Mr Minney did not start any adverse possession until significantly later, that is 2016, and therefore he did not have any qualifying adverse possession to defeat the claim for possession in the action and he made a possession order.
8. Mr Minney made an application for permission to appeal and that came before Mr Justice Eyre on the papers on 24 February 2023. He refused the application to bring the appeal out of time and he also refused permission to appeal. He indicated that had the appeal otherwise be meritorious he would have considered granting the necessary comparatively short extension needed to allow the appeal to be brought out of time, but said that in the light of his view he had taken on the merits there was no purpose in doing so.
9. The first and second grounds of appeal related to the Recorder's finding as to the date from which the appellant was in control of the land with the requisite intention to possess and Mr Justice Eyre, in relation to that, stated as follows:

“It is at least arguable with a real prospect of success that the police report dated 28 June 2011 is admissible as fresh evidence on the appeal. It appears that the appellant had tried to obtain it earlier, but had only received it on 15 September 2022 through no fault of his.

The contents of the report are *prima facie* credible; it is properly arguable that if admitted in evidence the report would have had an important impact on the Recorder’s findings of fact. It would have been independent evidence of the state of affairs on the land in June 2011; in particular, it would have provided strong support for the evidence of Mr Feratro, which the Recorder rejected at paragraph 41.

It is accordingly arguable that admission of the report would have led to a finding that the appellant had been in possession of the land from a date in 2011. It is arguable, though less likely, that it would have had a greater impact and would have provided support for a finding that the appellant had been in possession from an earlier date”.

10. On that basis, had that been the only matter in contention and the only matter for consideration by the learned Judge, it appears to me that permission to appeal would have been granted. However, Mr Justice Eyre went on to consider whether such a conclusion, namely that there had been adverse possession since 2011 and arguably since 2009, would have altered the ultimate outcome of the case.

11. Ground 3 related to the Recorder’s apparent decision that registration of the title on 27 September 2018 was conclusive that any 10-year period of possession by the defendant appellant needed to precede that date. He said:

“That was something of an over-simplification, a person in adverse possession of land may have a defence against a claim by the registered proprietor if the squatter is able to satisfy the requirements of section 98 of the Land Registration Act 2002 at the date of the commencement of the proceedings”.

12. Mr Justice Eyre therefore went on to consider the provisions of section 98 and schedule 6 to the Act of 2002 and he referred firstly to section 98(1), which in order for that defence to apply would require satisfaction of the condition under paragraph 5(4) of schedule 6 and it is agreed that on any view of the facts that particular provision or condition, as it was called in the schedule, could not be satisfied.

13. Mr Justice Eyre went on to say:

“10. Similarly, the defence under section 98(3) requires the conditions in paragraph 5(2) or 5(3) of schedule 6 to be satisfied and there is no basis for a finding that either of those conditions are satisfied”.

14. In this regard it appears to me that Mr Justice Eyre has fallen into error. Section 98(3) of the 2002 Act provides:

“A person has a defence to an action for possession of land if on the

day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 6 of schedule 6 to be registered as the proprietor of an estate in the land”.

15. Thus, the provisions of paragraphs 5(2) or 5(3) of schedule 6 are not relevant to section 98(3) of the Act. The question is whether, as a defence to these proceedings, Mr Minney can arguably bring himself within any alternative defence or doctrine. The relevant provision is section 98(6), which provides: “The defences under this section are additional to any other defences a person may have”.

16. The defence to which Mr Minney points and which he argues he could bring himself within is indeed the condition under paragraph 5(2) of schedule 6 which provides:

“The first condition is that (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant and, (b) the circumstances are such that the applicant ought to be registered as the proprietor”.

17. Paragraph 5(2) is not addressed directly in section 98 as paragraph 5(4) is. The question is whether in law, if Mr Minney were able to satisfy the Court of an estoppel of the kind envisaged by paragraph 5(2), he can thereby rely on that paragraph by virtue of section 98(6) as, “Any other defence”.

18. The authors of *Megarry & Wade* appear to suggest that they can. At section 7-104 of *Megarry & Wade* they state as follows:

“It will be noted that the Land Registration Act 2002 provides no express defence in the cases where, if S” [the letter S effectively stands for squatter] “had applied to be registered, she could have established either the first or second conditions that would have entitled her to be registered, namely estoppel or some other right to the land. However, such matters are already good defences to an action for possession and the defences given by the Land Registration Act 2002 are additional to any other defences, which a person may have”.

Thus, *Megarry & Wade* suggest that paragraph 5(2) is indeed caught by section 98(6) as any other defence. That then brings us to the proper interpretation of paragraph 5(2) and the argument of equitable estoppel. In that regard Mr Clarke for the respondents has drawn to my attention the earlier paragraph in *Megarry & Wade* at paragraph 7-095 where they state:

“The first condition is that it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as proprietor. The situation is therefore one where the squatter seeks to be registered according to the principles of proprietary estoppel so as to give effect to an equity that has arisen in his or her favour; those principles will be explained in a later chapter.

Situations in which it would be unconscionable for an owner to dispossess a squatter by reason of such an equity are likely to be rare

because the squatter is a trespasser, but they might occur as where a squatter mistakenly builds on a neighbour's land, thinking it to be his or her own and the neighbour, realising the squatter's mistake, acquiesces in it.

There may be cases, which come before the Court or the First Tier Tribunal in which an equity may have arisen in favour of a squatter where the Judge or First Tier Tribunal considers that the squatter is entitled to some relief, but not to the extent of being registered as proprietor of the land. In such circumstances both the Court, under its equitable jurisdiction and the First Tier Tribunal by statute, have power to give effect to the equity by giving some less extensive relief.

A squatter who considers that he or she is entitled to the land in question because of an equity arising by estoppel does not have to apply to the Registrar to be registered under schedule 6 to the Land Registration Act 2002, but may instead take court proceedings in the usual way to establish the equity and to ask the Court to give effect to it".

19. The matters upon which Mr Minney relies as supporting the estoppel appear to me to essentially be those which he set out in his witness statement for the purposes of the trial from paragraph 30 and 31 where he stated:

"I have been resident on the land since 2009, I have transformed the land from an outgrowing wasteland to what it is today. I have transformed the land from an unsafe plot of land and made good use of the land for me and my children, maintaining it, spending my own money improving it and making it my home for me and my children.

You only have to look at photographs, the historic Google photographs and the claimant's Google street view photographs to see the extent of the work I have carried out. I erected a number of sheds and barns on the property, including a wooden shed in 2011/2012, a white unit in 2014/2015, a blue unit in 2018, a further white unit in 2021 and a large metal barn in 2015; I erected a wooden fence, replacing this with a metal gate in 2015 and then a large set of iron gates in 2016; I spent a long time clearing and tidying the site.

31. From the moment I moved onto the property I did so with the intention to possess it. I did so without the owner's consent, in fact that is evident from the many conversations I have had with the claimants and/or their representatives over the years when they asked me to vacate the property.

I have been in actual possession of the land for nearly 13 years; I say who can come onto the land, I assert full control over the land. I would have registered myself as the owner of the land but for these proceedings; I intend to do so once the hearing is over".

20. Then, at paragraph 32 he states:

“The condition I rely upon is the first condition, that is it would be unconscionable because of equity by estoppel for me not to be registered as the owner of the land.

Whilst it is true the claimants have not given me permission to be on the land, they have known about me being there since 2009/2010. They made several threats about evicting me, but never did. They stood back and watched me develop the land; they stood back and watched me move a caravan onto the land and build structures on the land.

They had plenty of chances to do something about me being there before they did. My solicitor said they acquiesced to me being there; they failed to issue proceedings until the 10 years had expired. I acted to my detriment believing the land belonged to me, why would I not?

The claimants did not do anything about it until 30 September 2021, which is more than 10 years after; even on their own case I had been on the property. Not only did I spend money on the property; but I acted to my detriment in clearing the site”.

Effectively, this is where the defendant, the appellant, establishes by evidence his argument as to his right to argue the first condition under paragraph 5(2) of schedule 6 to the 2002 Act.

21. There is a difficulty though. As *Megarry & Wade* state, the defences envisaged by paragraph 98(6), and in particular the defence relating to paragraph 5(2) is essentially a defence that the person in adverse possession believed himself to have a proprietary right to the property and indeed Mr Minney says in the paragraph, which I have just quoted from, “I acted to my detriment believing the land belonged to me”.
22. The difficulty though is that Mr Minney accepts that at no stage in the 10 years from 2009 did he in fact believe the land belonged to him. Indeed, he knew the land did not belong to him and he has accepted before me that the owners of the land could have brought proceedings against him for possession of the land at any stage in those 10 years and he would have had no defence. His concession that he would have had no defence is contrary to his assertion that he believed the land belonged to him and that he had any kind of proprietary estoppel in the land.
23. In my judgment, it is not reasonably arguable on the appeal that Mr Minney can establish an equitable estoppel of the kind envisaged by paragraph 5(2) to schedule 6 to the 2002 Act, such as to amount to a defence, which would have enabled him to resist proceedings for possession before the 10 years had expired. Or to put it another way, his claim to ownership of the land whether equitable or otherwise depends exclusively upon his establishing the 10 years of adverse possession and that is not the kind of defence, which the sweep-up provision of section 98(6) is intended to cover.
24. In the circumstances, for reasons which differ from those of Mr Justice Eyre, I take the view that the appeal, which Mr Minney seeks to argue in defence to these proceedings, is not

reasonably arguable and therefore for the reasons I have stated permission to appeal is refused.

End of Judgment

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291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

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